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67/03/17 Petition for a Writ of Certiorari to the Supreme Court of Ohio

Louis Stokes

In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. 1161.

JOHN W. TERRY, *et al.*,

Petitioners,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

The petitioners, John W. Terry and Richard D. Chilton, pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Ohio, made and entered by said Court on the 19th day of October, 1966 (a copy of which is printed in Appendix A, *infra,* page 17) which dismissed the petitioners' appeals and thereby affirmed the Ohio Court of Appeals and the convictions of these petitioners who had been convicted and sentenced by the trial court.

OPINIONS OF THE COURTS BELOW.

The opinion of the trial court, that is, the Court of Common Pleas of Cuyahoga County, is officially reported as *State v. Chilton, et al.*, 95 Abs. 321 (September 22, 1964). This opinion is printed herein in Appendix B, *infra,* page 17.

The opinion of the Court of Appeals for Cuyahoga County, Ohio, which affirmed the convictions of the peti-

tioners by the trial court, is officially reported as *State v. Terry,* 5 Ohio App. (2d) 122; 214 N. E. (2d) 114; 34 O. O. (2d) 237 (February 10, 1966), and is printed herein as Appendix C, *infra,* page 21.

The Supreme Court of Ohio did not render any formal opinion in dismissing the petitioners' appeals, sua sponte, on the ground that no substantial constitutional question was involved.

JURISDICTION.

The judgment of the Supreme Court of Ohio was entered on the 19th day of October, 1966. Upon petitioners' timely application, the time within which petition for certiorari might be filed was extended by this Court from January 17, 1967 to March 18, 1967. (See Appendix D, *infra,* page 34.) The jurisdiction of this Court is invoked under 28 U. S. C. Section 1257(3), since rights, privileges and immunities under the United States Constitution are claimed to have been violated.

QUESTIONS PRESENTED.

I.

Where the trial court makes a finding that the arrest of the petitioners was unlawful, does the introduction of evidence against the petitioners, which was obtained as a result of the illegal arrests, violate the Fourth and Fourteenth Amendments to the United States Constitution.

II.

Where evidence has been seized from the person of the petitioners as the product of an illegal search and seizure, whether the refusal of the court to apply search and seizure law, and the substitution therefor of a stop and frisk doctrine, is a violation of the Fourth and Fourteenth Amendments to the United States Constitution.

III.

Where no emergency exists, and in the absence of probable cause, can a police officer acting upon bare suspicion alone stop, frisk, and search petitioners for a gun on the street, and can the Court of Appeals justify such conduct by substituting a standard of "reasonably suspects" for the "probable cause" set forth in the Fourth Amendment to the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED.

The pertinent portions of the United States Constitution are set out below:

Amendment IV.

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment XIV.

> "* * * Nor shall any state deprive any person of life, liberty or property without due process of law * * *."

STATUTE INVOLVED.

Ohio Revised Code Section 2923.01 is set out herein as Appendix E, *infra,* page 35.

STATEMENT OF CASE.

Petitioners herein were indicted, tried, convicted and sentenced to the Ohio State Penitentiary for the offense of Carrying a Concealed Weapon.

Prior to the trial, the Court conducted a hearing on petitioners' pre-trial motions to suppress the evidence, to-wit: guns. The entire testimony on the motions to suppress consisted of the testimony of one police officer. The State's entire case also consisted of the testimony of this one police officer. The Court overruled petitioners' motions to suppress (R. 94, *et seq.*) and upon trial permitted into evidence, the guns, shells, and the testimony of the police officer relating to custodial conversation with the petitioner, Richard Chilton, in the jail house.

The police officer called to testify on both the motions to suppress and the trial testified that his name was Martin McFadden; that he had been a police officer for 39 years and four months; and that he had been assigned to the Detective Bureau for 35 years.

He further testified that on the 31st day of October, 1963, he first observed one John Terry and one Richard Chilton standing at the corner of Huron Road and Euclid Avenue where these two streets intersect at East 13th Street in the City of Cleveland. That it was 2:00 or 2:30 p.m., and that it was broad daylight. After observing these two colored males standing at the corner talking, he positioned himself in the lobby of Rogoff's store, near 14th Street on Huron Road, for the purpose of further observation. During a period of some 10 to 12 minutes, he observed that one male would stand at the corner while the other one would walk up Huron Road. That this male would stop and look into either the Diamond Store or the United Airlines Office for a second or so and then continue west on Huron Road near Halle Brothers store. He would

then turn around, come back to the spot where the stores were, peer in the window, and go back to the corner where he would talk with the waiting male. Then the man who had been waiting would go through this same procedure. The testimony with reference to the number of trips each man made varied from two to three times each to four to five times apiece. (R. 14, 22, 24.)

During this 10 to 12 minute period of observation, the officer stated that he saw a short, white man come over to the corner, converse with these two colored males for a minute or so, and then walk west on Euclid.

He then observed the two colored males walk west on Euclid Avenue in a natural manner, and at Zucker's store, 1120 Euclid Avenue, he saw them stop in front of this store and again converse with the same white male.

The officer further testified that these three men were just standing in front of the store with their backs to the display window; that they were just talking; and that he approached them and stated that he was a police officer. He said that he asked them their names and that "they gave it to me quick." (R. 17) (At all other places in the record he says "they mumbled something.") Then without any further conversation between the officer and these men, and no overt act on the part of the men, the police officer conducted himself as follows:

> "A. * * * I got Chilton then, not Chilton but Terry, and I turned him around and I stood in the back of them, and I searched them, and in his upper left hand pocket of his topcoat I felt a gun and I went in for it and I had a tough time getting it, so I took the coat off. I at that time informed them, the three of them, to keep their hands out of their pockets and walk into the store. When they got into the store I told them to face the wall, keep their hands away, and on searching Chilton in his left hand pocket of his top-

coat I found a gun, a '38, and searching Katz I found nothing." (R. 16, 17.)

The three men were then taken to the Cleveland Police Station where they were booked for "Investigation." A day or so later, Terry and Chilton were charged with "Carrying a Concealed Weapon," a felony, and Katz was charged with "Being a Suspicious Person," a misdemeanor.

The officer admitted that there were people on the street when this matter occurred and that the stores were open and that there was business as usual in the downtown area. He admitted that he did not know any of these men (R. 44, 119); that no one had furnished him any information regarding them (R. 43, 44, 119); and that his reason for watching them was that "they didn't look right to me at the time." (R. 119) With reference to his reason for approaching the men in front of Zucker's and turning Terry around and patting him down, the officer testified as follows: "In the first place I didn't like their actions on Huron Road, and I suspected them of casing a job, a stick-up. That's the reason." (R. 42) He said that he patted them down "* * * to see what they had, if they had guns." (R. 42) However, he testified under inquiry by the Court that in 39 years as a police officer and 35 years as a detective, that he had no experience in observing individuals casing a place and had never observed anybody casing a place. (R. 46)

ARGUMENT RELIED ON FOR ALLOWANCE OF THE WRIT.

I.

Where an arrest is unlawful, evidence seized as a result thereof and used at the trial violates the Fourth and Fourteenth Amendments.

When the police officer in this case approached the petitioners and the third man, without probable cause, and subjected Terry to his domination, an arrest occurred. Upon turning Terry completely around for the purpose of beginning his frisk the police officer had then and there arrested Terry without probable cause.

The trial court was therefore correct in making its findings that the arrest in this case was not legal. (R. 96, 100.) It was, therefore, incumbent upon the Court to suppress the evidence which was the product of an illegal search and seizure and the failure to suppress was in violation of the Fourth and Fourteenth Amendments. *Mapp v. Ohio,* 367 U. S. 643 (1961.)

It is our contention that this Court should render an appropriate opinion which would declare that the police cannot, in the absence of probable cause, stop and frisk, and as a result thereof acquire probable cause to arrest.

In *Ker v. California,* 374 U. S. 23 (1963), which was relied upon by the trial court as authority for a state being able to establish its own rules and standards pertaining to search and seizure, this Court nevertheless emphatically ruled that:

> "We reiterate that the reasonableness of a search is in the first instance a substantive determination to be made by the trial court from the facts and circumstances of the case and in light of the 'fundamental criteria' laid down by the Fourth Amendment and

> in opinions of the Court applying that Amendment. Findings of reasonableness, of course, are respected only insofar as consistent with Federal constitutional guarantees."

This Court has never considered the question which this case presents, i.e., whether there is a distinction between stopping and frisking, and search and seizure. It is our contention that there is no such distinction, and that regardless of the generic term used, i.e., "frisk," "tap," "pat," or "search," the result is a search, and a search incident to an unlawful arrest is constitutionally prohibited. If one "taps," "pats," or "frisks," for narcotics or policy slips, and the finding of them is an illegal search, then if one "taps," "pats," or "frisks," for a gun, and finds it, it is still an illegal search. (But cf. Trial Court's opinion, App. B at page 19). The product of the search is not dispositive of its nature.

The basic principles set forth in *Ker v. California, supra,* which this Court gave to the States to guide them, would foreclose the establishment by the States of standards below the minimal ones required by the Fourth Amendment. Therefore the use of *Ker v. California, supra,* by the States, to justify the recognition of a standard known as "reasonably suspects" in order to avoid the application of search and seizure law as set forth in *Mapp v. Ohio, supra,* and *Beck v. Ohio,* 379 U. S. 89 (1964) involves a misreading of *Ker* and is clearly violative of the standards set forth in the Fourth Amendment.

In light of the interpretation being given to *Ker,* id., by State of Ohio and other states (see *People v. Rivera,* 14 N. Y. (2d) 441 (1964) Cert. Den. 379 U. S. 978 (1965)), it is necessary that this Court examine the exception now being established. By declaring that "stopping" and "frisk-

ing" to acquire probable cause is not constitutionally permissible, *Ker* will be vindicated. The portion of *Ker*, id., which is being circumvented is:

> "The evidence at issue, in order to be admissible, must be the product of a search incident to a lawful arrest, since the officers had no search warrant. The lawfulness of the search without warrant, in turn, must be based upon probable cause, which exists where the facts and circumstances within their (the officers) knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. *Brinegar v. United States*, 338 U. S. 160, 175-176 (1949), quoting from *Carroll v. United States*, 276 U. S. 132, 162 (1925); accord, *People v. Fischer*, 49 Cal. 2d 442, 317 P. 2d 967 (1957); *Bompensiero v. Superior Court*, 44 Cal. 2d 178, 281 P. 2d 250 (1955)."

II.

The substitution of a "stop and frisk" doctrine for "probable cause" violates the Fourth and Fourteenth Amendments.

In considering whether the officer had probable cause for arrest, these excerpts from his testimony are of prime importance:

1. When asked at what point he considered their actions unusual, his reply was (R. 118):

> "Well, to be truthful with you, I didn't like them. I was just attracted to them, and I surmised that there was something going on when one of them left the other one and did the walking up, walk up past the store and stopped and looked in and came back again."

2. At R. 119:

> "Q. You didn't know either one of these men did you?

A. I did not.

Q. And no one had furnished you any information with regard to these two men, have they?

A. Absolutely no information regarding these two men at all. I am telling the truth when I say that."

3. At R. 121:

"Q. Now when you saw this white man come over and talk to the two of them, there at the corner of Huron and 14th, did you know this white man?

A. No, I didn't.

Q. You had no information with reference to this white man?

A. No information on anything that I—on anything that I seen, anything that I seen I had no information whatsoever on."

4. At R. 129-134:

"Q. Well, you tell the court as you walked through the door you said 'Order the wagon' and as you further say you were then arresting Chilton, Terry and Katz—

A. That's right.

* * * * *

Q. What were Chilton and Katz being arrested for?

A. Association.

Q. Is that your complete answer, sir?

A. Well, they were found in company with a man with a revolver.

Q. So then at that point they were being arrested for association?

A. They were being arrested, yes, period.

Q. Do you know of any charge under Ohio Law entitled 'Association'?

* * * * *

A. As far as I know, I don't know."

5. At R. 45:

"Q. But when you walked up to these men and you first spoke to them you did not know that these men had guns on them, did you?

A. Absolutely not."

The above colloquy demonstrates the absence of probable cause for arrest.

The after-the-event justification does not create probable cause. An arrest without a warrant by-passes the safeguards provided by an objective predetermination of probable cause. It substitutes instead the far less reliable procedure of an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment. *Beck vs. Ohio, supra,* 142; *Wong Sun vs. United States,* 371 U. S. 471, 479, 480 (1963).

This Court has already made it clear that good faith on the part of the arresting officer is not enough. *Beck vs. Ohio, supra; Henry vs. United States,* 361 U. S. 98, 102 (1959). An Ohio case in point is *Rasey, et al. vs. Ciccolino, Admx.,* 1 Ohio App. 194; 18 C. C. (NS) 331; 24 C. D. 294 (1913).

In justifying the application of the "stop and frisk" distinction, the trial Court in the present case said, "Had he gone into their pockets and obtained evidence, as an example, narcotics or illegal slips, there would be no question of an illegal search and seizure." (R. 98.) This rationale justifying a search because the fruit is a pistol as distinguished from narcotics or illegal slips cannot survive the proscription against mere evidential searches established in *Gouled v. United States,* 255 U. S. 298 (1921). And in any event, a valid search must be by warrant issued upon probable cause or incidental to a valid arrest.

Even suspicious conduct alone does not subject a person to loss of his immunity from search of his person, and exempt him from inclusion in the Fourth Amendment. *U. S. v. DiRe,* 332 U. S. 481 (1948); *People v. Henneman,* 367 Illinois 151 (1937); *People v. Ford,* 356 Ill. 572, 191 N. E. 315 (1934); *People v. Macklin,* 353 Ill. 64, 186 N. E. 531 (1933).

This Court in its decisions on illegal searches and seizures has never recognized a special search known as "a frisk," exempt from the Fourth Amendment requirements. Such a distinction, without a difference, poses a new and unique problem for citizens, by subjecting them to search and seizure based upon suspicion alone.

III.

Substituting a standard of "reasonably suspects" for "probable cause" violates the Fourth and Fourteenth Amendments.

In this case, we are confronted with an unusual position being taken by an inferior court prior to review by this Court. The Ohio Court of Appeals stated in its opinion (Appendix C at pages 32-33) that:

> "* * * even if the Supreme Court would hold that federal officers may not inquire into suspicious street activities or frisk in the absence of probable cause to arrest, this does not necessarily invalidate the applicable state rules. There is no mandate in the Mapp opinion that the states henceforth must abide by all the interpretations of the federal courts."

In light of this pronouncement it would seem necessary for this Court to rule that the establishment of lesser standards to escape the dictates of the Fourth Amendment will not be tolerated whether committed by federal officers or State officers.

The Court of Appeals took the same position as the trial Court took respecting the arrest, i.e., that the arrest did not take place until the petitioners were ordered into the store (Appendix C, at page 31); however, they noted that even if the arrest took place as petitioners contend, that it does not follow that the evidence must be suppressed. This Court then is confronted with a situation in which policemen are permitted to stop citizens on the street, turn them around, and frisk them in public view, without an arrest occurring. If this illegal search of the person yields a product, e.g., a gun, the illegal yield is used to supply probable cause for arrest.

The lower appellate court also distinguishes *Henry v. United States,* 361 U. S. 98 (1959) from the instant case by virtue of the fact that the government conceded in that case that the arrest took place the moment the car in which Henry was riding was stopped by the federal agents. The Court then justified its holding on the basis that this police officer in the instant case "reasonably suspected" that the defendant was "casing" a store with robbery in mind, that it was therefore logical for him to presume that the defendant was armed, and the finding of the gun therefore justified the frisk and gave him "probable cause" to arrest.

We would urge this Court to examine this case in accordance with its statement in *Beck v. Ohio, supra*:

> "* * * While the Court does not sit as in nisi prius to appraise contradictory factual questions, it will, where necessary to the determination of constitutional rights, make an independent examination of the facts, the findings, and the record so that it can determine for itself whether in the state court findings, such as a finding as to the reasonableness of a search and seizure, the constitutional criteria established by the Supreme Court have been respected."

An examination of the facts and applicable law in this case will clarify the issue as to when an arrest occurs. This issue has never been squarely met by decision of this Court. Petitioners' contention is that when a person is lawfully arrested, the police have a right, without a search warrant, to make a contemporaneous search of the person of the accused for weapons or for the fruits of or implements used to commit the crime. *Beck v. Ohio,* id., *Weeks v. United States,* 232 U. S. 383, 392 (1914); *Agnello v. United States,* 269 U. S. 20, 30 (1925). However, it is equally clear that in the absence of a lawful arrest, there is no right to search even for weapons. Likewise, the appeal to necessity and the exigency of the situation should not be available to a police officer to protect an arrest which is not valid, or to secure evidence for which he was not entitled to search.

CONCLUSION.

We urge this Court to grant certiorari and to announce as fundamental to due process, that:

1. The product resulting from a "stop and frisk" based upon suspicion cannot be used to provide the probable cause for an arrest without contravening the Fourth and Fourteenth Amendments.

2. The substitution of a doctrine of "stop and frisk" and the refusal to apply search and seizure law to the product of an illegal search and seizure is in violation of the Fourth and Fourteenth Amendments to the United States Constitution.

3. The substitution of a standard of "reasonably suspects" for "probable cause" set forth in the Fourth Amendment is inherently violative of the United States Constitution.

The questions presented by this appeal are substantial and are of public importance.

Respectfully submitted,

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APPENDIX A.

JUDGMENT ENTRY OF SUPREME COURT OF OHIO.

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

APPENDIX B.

OPINION OF THE COURT OF COMMON PLEAS OF CUYAHOGA COUNTY, OHIO.

FRIEDMAN, J. Gentlemen, it was suggested yesterday that briefs be filed and I stated that it was not necessary, in light of the fact that I have given this matter considerable attention as to the law, and the only question before me was to determine the facts so the proper law can be applied.

There is no question about the facts in this case, so I don't think it is necessary for me to repeat at length save and except to state that the police officer of many years of service and experience had observed the action of the defendants which indicated to him that they were casing a robbery.

There is no doubt in my mind that the officer, based upon his training, length of service, and experience as a police officer and detective, assigned in the area which he had been placed, and doing the job he had been doing, had reasonable cause to believe and to suspect that the defendants were conducting themselves suspiciously and some interrogation should be made of their action.

The Supreme Court of the United States has in many cases of recent years expressed itself clearly and distinctly that a general search and seizure is in violation of the Fourth Amendment unless the search is done with a proper warrant from the court, or if the search is made in connection with a lawful arrest and is contemporaneous and incidental to such arrest. *Henry v. U. S.*, 361 U. S. 98, 4 L. Ed. (2d), 134. *Ker v. California,* 374 U. S., 23, 10 L. Ed. (2d), 726; *Mapp v. Ohio,* 367 U. S. 643, 6 L. Ed. (2d) 1081.

There is no evidence that any warrant had been issued for a search or frisk and I am not going to stretch the facts and say that there was a lawful arrest prior to the frisk of the defendants. I believe it would be stretching the facts beyond reasonable comprehension and foolhardy to say there was a lawful arrest, because there wasn't, from the facts as presented.

It has been frequently stated by the U. S. Supreme Court that a state may establish its own rules and standards pertaining to search and seizure so long as these rules and standards do not violate the substance and spirit of the Fourth Amendmant. It would certainly follow that the same rule would apply to the problem of "stopping and frisking" of an individual by a police officer where the facts justify.

In the case of *Ker v. California,* 374 U. S., 323, 10 L. Ed. (2d) 726, the court pronounced: "A state is not precluded from developing workable rules governing searches to meet the practical demands of effective criminal investigation and law enforcement that does not violate the constitutional standards of what is reasonable search and seizure."

Our courts in Ohio have on many occasions expressed that a police officer has the right to stop a suspicious person for the purpose of interrogation. Therefore, can it be

said that the frisking of said person by the officer for the purpose of his own safety is a standard set by our state that is violative of the Fourth Amendment, or is it a proper guidance to meet the practical demands of effective criminal investigation and the safety of the officer performing his sworn duty? This Court believes that it is the latter view that would be prevailing and that such conduct would not be held as a violation of the Fourth Amendment.

We cannot forego and forget that police officers have a job to do, and they must do the job in connection with crime which has been on the increase.

At the same time a police officer cannot—as far as this Court is concerned—and will not be permitted to stop and frisk an individual simply because he has a suspicion, a mere suspicion, unless they are reasonable circumstances justifying a frisk.

This Court believes there is a distinction between stopping and frisking, and search and seizure.

A search is primarily for the purpose of trying to obtain evidence in connection with the commission of a crime, that the police officer may reasonably believe that a crime has been committed or might be committed.

A frisking is strictly for the protection of the officer's person and his life.

There was reasonable cause in this case for the officer, Detective McFadden, to approach these individuals and pat them. He approached them, and for his own protection frisked them. He did not go into their pockets. Had he gone into their pockets and obtained evidence, as an example, narcotics or illegal slips, there would be no question of an illegal search and seizure.

He merely tapped them about the outer part of their bodies to determine if they had any weapons or guns, for his own personal protection, and by doing so he discovered

that two of the three individuals had concealed guns, and the guns are the fruit of the frisk, and not of a search.

In the case of *People v. Rivera* (7/10/64) decided by New York Court of Appeals, 33 U. S. Law Week, 2044 July 28, 1964, the court stated that a policeman has the authority to stop and question a suspect. "Prompt inquiry into suspicious or unusual conduct is an indispensable power in the orderly government of a large urban communities." (Sic)

The frisk is essential to the stop for without the latter the answer to the police officer may be a bullet, and a loaded pistol discovered during the frisk is admissible.

In the case of *People v. Martin,* 46 Cal. (2d) 106, the court similarly upheld stop and frisk by an officer, and the court in effect stated the security of public order and lives of the police are to be weighed against a minor inconvenience and petty indignity.

I may say at this time, I am a great believer of the personal rights propounded by our Supreme Court, reiterated and reaffirmed, neglected over the years, and given to us under the Fourth Amendment, and other amendments of the U. S. and State Constitutions.

But police officers in a community also have rights under the constitution, and rights given to them by virtue of their office, and one of their rights as I have indicated is the right when the circumstances justify and there is a reasonable suspicion, and for his own personal protection, to stop the individual or individuals and not search, but to frisk, to determine if there are weapons for his own personal safety; and finding the weapon by frisking is the fruit of the stop and frisk, in the same relation that the courts refer to the fruits of the crime on a search and seizure. *Ballard v. State,* 43 Ohio St., 340; *Clark v. DeWalt,* 65 Ohio Law Abs., 193, 203.

I believe that I reiterate again that search and seizure law cannot be applied in this particular case, although Mr. Reuben Payne endeavored to show there was a lawful arrest, but the Court cannot agree. If there was an arrest it came subsequent to the frisk.

But as I have stated, and I repeat again, there is a distinction between a frisk and a search and seizure.

This matter is of great importance and of great concern, and I certainly hope that counsel will endeavor to have this question determined by the Appellate Courts, for it is most desirable that we have clearness with respect to this problem and that the police officers know what they may do and can do in a stop and frisk matter.

The motion in each case is overruled, and exception to the defendants. It is so ordered.

APPENDIX C.

OPINION OF THE COURT OF APPEALS OF OHIO, CUYAHOGA COUNTY, EIGHTH DISTRICT.

SILBERT, *C.J.*

This is an appeal on questions of law from a judgment and sentence imposed by the Court of Common Pleas of Cuyahoga County.

John W. Terry, the appellant herein, was indicted on a charge of carrying a concealed weapon in violation of Section 2923.01, Revised Code. A pre-trial motion to suppress the evidence was denied and upon a plea of not guilty, the Court, sitting without a jury, returned a verdict of guilty.

The relevant facts are as follows: At approximately 2:30 in the afternoon of October 31, 1963, a Cleveland detective with thirty-nine years of experience observed two persons, later identified as John W. Terry and Richard D. Chilton, engaged in behavior, on the corner of East 14th Street and Euclid Avenue (in downtown Cleveland), which immediately attracted his attention and aroused his suspicions. Positioning himself across the street he observed these men for approximately ten to twelve minutes as they alternately left the corner on which the other was stationed, walked several hundred feet up the Huron Road block, peered into the window of either a jewelry store or an airline office and then returned to the corner to converse with the other. In turn the other person would leave the corner, repeat these actions and return to the corner. This procedure was repeated at least two to five times by both men. During this period, a third man, later identified as Carl Katz, approached the corner, spoke briefly to the two men and then departed.

After ten to twelve minutes of this behavior, Terry and Chilton left the corner and proceeded west on Euclid Avenue several hundred feet to where they again met Katz. The three then engaged in a conversation. As the detective testified: "* * * I didn't like their actions on Huron Road, and I suspected them of casing a job, a stick-up * * *." With this belief in mind, the detective approached the three men, identified himself and asked for their names. Receiving only a mumbled response, the detective turned the defendant around, quickly "patted down" the outside of his clothing, and, perceiving a hard object in the inner breast pocket of his topcoat, inserted his hand and removed a fully loaded automatic. At this point the detective ordered the three men into a store, told them to face the wall and yelled to a store clerk to

"call the wagon." He then proceeded to "pat down" Chilton and upon perceiving a hard object in the lefthand pocket of his topcoat, inserted his hand and removed a fully loaded revolver. A similar "patting down" of Katz revealed nothing. The three men were then taken to the police station where Terry and Chilton were charged with carrying concealed weapons. Separate trials were ordered and after a motion to suppress was denied, the defendant Terry was convicted of a felony under Section 2923.01, Revised Code.

In the defendant appellant's brief, the following assignments of error are made:

> 1. The Court erred in not sustaining defendant's Motion to Suppress upon making its finding that the arrest herein was illegal.
>
> 2. The Court erred in refusing to apply constitutional guarantees prohibiting illegal searches and seizures and substituting therefor a doctrine of stop and frisk. The fourth amendment to the United States Constitution provides:
>
> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."

This amendment prohibits an arrest without "probable cause," *Wong Sun vs. United States,* 371 U. S. 471 (1962), and is applied against the states through the fourteenth amendment. *Wolf vs. Colorado,* 338 U. S. 25 (1949).

However, the ambiguous nature of the word "arrest" and the issue of the right of the police to stop a person in a public street and question him under circumstances that

would reasonably call for investigation and inquiry present complex legal questions in the factual context of this case. Consequently, the initial question to be resolved is the authority of the detective in the circumstances shown here to stop and question the defendant. The validity of the subsequent police action and the determination of whether the detective had adequate "reasonable grounds" to make the arrest will hinge, in part, on the propriety of this initial inquiry.

The right of the proper authorities to stop and question persons in suspicious circumstances has its roots in early English practice where it was approved by the courts and the common law commentators. See, 2 *Hawkins, Pleas of the Crown,* 122, 129 (6th Ed. 1787): 2 *Hale, Pleas of the Crown,* 89, 96-97 (Amer. Ed. 1847): *Lawrence vs. Hedger,* 3 Taunt. 14, 128 Eng. Rep. 6 (C. P. 1810). Today, in several states, the authority of police officers to detain suspects for a reasonable time for questioning is granted by statute. E.g., N. Y. Code of Crim. Pro., Sec. 180A (1965 Supp.): Gen. Laws of R. I., Sec. 12-7-1 (1956): N. H. Rev. Stat. Ann., Ch. 594, Sec. 2 (1955): 11 Del. Ann. Code, Sec. 1902 (1953): Warner, The Uniform Arrest Act, 28 Va. L. Rev. 315 (1942): Mass. Gen. Laws, Ch. 41, Sec. 98 (1961). In others, the right is recognized by court decisions. E.g., *People vs. Rivera,* 14 N. Y. (2d) 441 (1964): *Gisske vs. Sanders,* 9 Cal. App. 13 (1908): *People vs. Fagenkrantz,* 21 Ill. (2d) 75 (1961).

The United States Supreme Court, however, has never squarely decided whether the police may constitutionally stop and question a suspect without his consent in the absence of adequate grounds for arrest. However, the lower federal courts permit such field interrogations. See, *Henry vs. United States,* 361 U. S. 98, 106 (1959) (Clark, J. dissenting): *Brinegar vs. U. S.,* 338 U. S. 160, 178

(1949) (Burton, J. concurring): *Keiningham vs. United States,* 307 F. (2d) 632 (D. C. Cir. 1962), cert. den. 371 U. S. 948 (1963): *Busby vs. United States,* 296 F. (2d) 328 (9th Cir. 1961), cert. den. 369 U. S. 876 (1962). The cases also indicate that an officer may stop and question even though he has insufficient grounds to make an arrest. See, *Ellis vs. United States,* 264 F. (2d) 372 (D. C. Cir.), cert. den. 359 U. S. 998 (1959): *United States vs. Bonanno,* 180 F. Supp. 71, 78 (S. D. N. Y. 1960), rev'd on other grounds sub nom., *U. S. vs. Buffalino,* 285 F. (2d) 408 (2d Cir. 1960), cited with approval in *U. S. vs. Vita,* 294 F. (2d) 524, 530 (2d Cir. 1961).

Admittedly there is some division of authority on the legality of the right to stop and question; however, the better view seems to be that the stopping and questioning of suspicious persons is not prohibited by the Constitution. See, Note, 50 *Cornell L. Q.* 529, 533 (1965); *United States vs. Vita,* 294 F. (2d) 254 (2d Cir. 1961), cert. den. 369 U. S. 823 (1962). Of great persuasive authority do we consider the long line of California cases, decided under the rule of *People vs. Cahan,* 44 Cal. (2d) 434 (1955) in which this practice has been upheld. E.g., *People vs. Martin,* 46 Cal. (2d) 106 (1956); *People vs. Simon,* 45 Cal. (2d) 645 (1955); *People vs. Jones,* 176 Cal. App. (2d) 265 (1959). Also of great persuasive authority is the recent New York Court of Appeals decision in *People vs. Rivera,* 14 N. Y. (2d) 441 (1964) wherein this practice was also upheld. The courts of Ohio do not appear to have been squarely presented with this problem before. Therefore, we hold, in line with the great weight of authority, that a policeman may, under appropriate circumstances such as exist in this case, reasonably inquire of a person concerning his suspicious on-the-street behavior in the absence of reasonable grounds to arrest.

An individual who acts in a suspicious manner invites a preliminary inquiry by the proper authority. It does not unreasonably invade the individual's right to privacy to hold that the price of indulgence in suspicious behavior is a police inquiry. See, Traynor, Mapp vs. Ohio At Large In The Fifty States, 1962 *Duke L. J.* 319 (1962). Such a minor interference with personal liberty would "touch the right of privacy only to serve it well." *Traynor, supra,* at p. 334. If such questioning failed to reveal probable cause, it would thereby forestall invalid arrests of innocent persons on inadequate cause and the attendant invasion of personal liberty and reputation. If it revealed probable cause, it would do no more than open the way to a valid arrest. The business of the police is not only to solve crimes after they occur, but to prevent them from taking place whenever it is legally possible. As stated by the New York Court of Appeals in the recent case of *People vs. Rivera, supra,* at p. 444:

> "The authority of the police to stop defendant and question him in the circumstances is perfectly clear. * * * Prompt inquiry into suspicious or unusual street action is an indispensable police power in the orderly government of large urban communities. It is a prime function of city police to be alert to things going wrong in the streets; if they were denied the right to such summary inquiry, a normal power and a necessary duty would be closed off."

Admittedly, this power to inquire may be abused. But the possibility of some future infraction should not require that the police should now be made powerless to make reasonable inquiries into suspicious behavior. If such abuses arise, we shall deal with them when the time comes. However, for the present, we hold that under the facts of this case, the detective's inquiry was reasonable under the conditions presented.

The appellant contends, however, that in the instant case, despite a right of inquiry, the arrest took place the moment the defendant was questioned by the detective. According to his argument, since the arrest took place at the time of the initial inquiry, there was at that time no adequate "reasonable grounds" to arrest and therefore under the exclusionary rule of *Mapp vs. Ohio,* 367 U. S. 643 (1961), the evidence must be suppressed. In support of this the defendant appellant's brief states: "Since the police officers in this case did not conduct any interrogation of the defendant and his companions other than an inquiry of their names * * * his purpose was to arrest and not to interrogate."

A principal cause of the difficulty here is the ambiguous nature of the word "arrest." Some courts have used the term "arrest" to signify the mere act of stopping or restraining a person. But the term "arrest" is more commonly used in the technical criminal law sense as the seizure of an alleged offender to answer for a crime. Note, 39 *N. Y. U. L. Rev.* 1093, 1096 (1964); *Commonwealth vs. Lehan,* 347 Mass. 197 (1964). The cases decided by the United States Supreme Court appear to have adopted this later usage, see *Carroll vs. United States,* 267 U. S. 132, 136 (1925); *Brinegar vs. United States,* 338 U. S. 160, 163 (1949), and it is the usage that has been adopted by the courts of Ohio. In 5 *Ohio Jurisprudence* (2d), Arrest, Sec. 3, p. 19, "arrest" is defined as follows:

> "An arrest as the term is used in criminal law signifies the apprehension or detention of the person of another in order that he may be forthcoming to answer an alleged or supposed crime."

Similarly, in *State vs. Milam,* 108 Ohio App. 254, 268 (1959), this court quoted with approval the following definition of arrest:

"To constitute an 'arrest,' four requisites are involved: A purpose to take the person into custody of the law, under real or pretended authority and an actual or constructive seizure or detention of his person, so understood by the person arrested."

It is readily apparent that a required element of an arrest is the *intent* of the officer to arrest. *United States vs. Bonanno, supra,* at 81-83. In the instant case, when the detective approached the defendant, he had, as shown by uncontradicted testimony, no intention at all to arrest, but only to inquire as to the defendant's activities. As stated in the record:

"Q. You observed these men for some ten to twelve minutes?

A. That's right.

Q. You observed the mode of conduct that you have described to us?

A. That's right.

Q. Did you, sir, as a police officer consider that you should investigate it?

A. I did.

* * *

Q. * * * after they left the corner and you observed them again in front of * * * (the store where the three men met) * * * what did you do?

A. I stopped them and went over and talked to them."

As to the exact time when the arrest took place, the record shows:

"Q. Then in this situation you considered them to be under arrest when you ordered the store people to call for the wagon?

A. That's right."

The defendant appellant, however, contends that the case of *Henry vs. United States,* 361 U. S. 98 (1959), estab-

lishes the point that the arrest in the instant case took place the moment the defendant was stopped by the detective. However, in the *Henry* case, the government conceded in the lower courts, see 259 F. (2d) 725 (7th Cir. 1958), and adhered to the concession before the Supreme Court, that the "arrest" occurred the moment the car in which Henry was riding was stopped by the federal agents. The Supreme Court in its opinion stated:

> "The prosecution conceded below, and adheres to that concession here, that the arrest took place when the federal agents stopped the car. This is our view of the facts of this particular case." 361 U. S. at 103.

When the opinion in *Henry* is read in light of this concession, it is apparent that the court was only deciding that, in the circumstances of that case, there was no probable cause to justify an "arrest" at the time the car in which Henry was riding was stopped. See, *United States vs. Bonanno, supra* at p. 85; *Busby vs. United States, supra.* Therefore, we hold that, in the instant case, the actual arrest did not occur until the defendant was ordered into the store after the loaded gun was discovered concealed on his person; Cf. *Rios vs. United States,* 364 U. S. 253 (1960).

Having determined that the police officer could validly inquire into the activities of the defendant, then it follows that the officer ought to be allowed to frisk, under some circumstances at least, to insure that the suspect does not possess a dangerous weapon which would put the safety of the officer in peril. See, Remington, The Law Relating to "On The Street" Detention, Questioning and Frisking of Suspected Persons and Police Arrest Privileges in General, 51 *J. Crim. L., C. & P. S.* 386, 391 (1960). What is the officer to do in this situation? Are we to allow him the right of inquiry and then, when this right is exercised, reward him with an assailant's bullet? The practice of

frisking is well accepted in police practice and police officers seem unanimous in stating that frisking is done for self-protection and not as a mere evidentiary fishing expedition. See, Note, Philadelphia Police Practice and The Law of Arrest, 100 *U. Pa. L. Rev.* 1182 (1952); Leagre, The Fourth Amendment and The Law of Arrest, 54 *J. Crim. L., C. & P. S.* 393 (1963). The Uniform Arrest Act and the state statutes which provide for questioning of suspicious persons specifically allow for the frisking of a suspect. See, Warner, The Uniform Arrest Act, 28 *Va. L. Rev.* 315 (1942); Gen. Laws of R. I., Sec. 12-7-2 (1956); N. H. Rev. Stat. Ann., Ch. 594, Sec. 3 (1955); 11 Del. Code Ann., Sec. 1903 (1953); N. Y. Code Crim. Pro., Sec. 180a (1965 Supp.). In other states the right is recognized by court decision. See, *People vs. Rivera,* 14 N. Y. (2d) 441 (1964); *People vs. Martin,* 46 Cal. (2d) 106 (1956); *People vs. Simon,* 45 Cal. (2d) 645 (1955); *People vs. Jones,* 176 Cal. App. (2d) 265 (1959).

In the instant case this officer, of thirty-nine years experience, reasonably suspected that the defendant was "casing" a store with robbery in mind. It was also logical for this experienced detective to presume that the defendant was armed and dangerous. As stated in the record:

> "Q. Detective McFadden, can you tell us why you turned John Terry around facing the other two men, with you behind him?
>
> "A. Due to my observation, the observation on Huron Road of these two men, I felt as though they were going to pull a stick-up and they may have a gun."

However, we must be careful to distinguish that the frisk authorized herein includes only a frisk for a dangerous weapon. It by no means authorizes a search for contraband, evidentiary material, or anything else in the

absence of reasonable grounds to arrest. Such a search is controlled by the requirements of the fourth amendment and probable cause is essential. *White vs. United States,* 271 F. (2d) 829 (D. C. Cir. 1959). Therefore, we hold only that on the facts presented in the instant case, the frisk for dangerous weapons was valid as an incident to a valid inquiry by the police. Each case must be decided upon its own facts.

As a result of the valid frisk, a fully loaded automatic was discovered concealed on the person of the defendant. The unauthorized possession of this weapon is a felony under Section 2923.01, Revised Code. According to the uncontradicted evidence in this case, the defendant was not arrested until after he was ordered into the store. At the moment of the arrest, the detective had reasonable grounds to believe a felony was being committed. As stated in *Beck vs. Ohio,* 379 U. S. 89 (1964):

> "Whether an arrest is constitutionally valid depends upon whether, at the moment the arrest is made, the officers had probable cause to make it—whether at that moment, the facts and circumstances within their knowledge of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing the petitioners had committed or were committing an offense."

Therefore, we hold that, as the detective had validly found the gun, he had at the moment of the arrest adequate probable cause to arrest the defendant, *Busby vs. United States, supra,* and that the arrest in no way violated the fourth amendment.

One further point remains to be discussed concerning defendant appellant's contention that the arrest occurred at the time of the initial questioning and therefore under the exclusionary rule of *Mapp vs. Ohio,* 367 U. S. 643

(1961), the evidence must be suppressed. Although we had held that the arrest in this case did not take place until the defendant was ordered into the store, we must note in passing that even if the arrest took place as appellant contends, it does not necessarily follow that this evidence must be suppressed.

The *Mapp* exclusionary rule was imposed upon the states not because of some command inherent in the fourth amendment, but rather because the Supreme Court believed that it was the only way the police could be forced to respect the fourth amendment. If the police could not obtain a conviction using evidence unlawfully obtained, they would have no incentive to conduct illegal searches. If we keep in mind this raison d'etre of the exclusionary rule, we can guard against confusion in the attendant rules that are developed. A judicial rule rendering evidence produced as the result of a frisk inadmissible would fail to deter the police from frisking suspects believed to be armed as police frisk for their own protection rather than for the purpose of looking for evidence. A rule of inadmissibility in such cases could only result in allowing the armed criminal to go free although failing to any meaningful extent to protect individual liberty. The exclusionary rule of illegally obtained evidence cannot be interpreted solely to provide a tidy "fox hunting" theory of criminal justice. The purpose of the exclusionary rule is to control police misconduct and in this context it must be applied. Traynor, Mapp vs. Ohio At Large In the Fifty States, 1962 *Duke L. J.* 319 (1962); Note, 50 *Cornell L. Q.* 529 (1965).

Furthermore, even if the Supreme Court would hold that federal officers may not inquire into suspicious street activities or frisk in the absence of probable cause to arrest, this does not necessarily invalidate the applicable

state rules. There is no mandate in the Mapp opinion that the states henceforth must abide by all the interpretations of the federal courts. Traynor, Mapp vs. Ohio At Large In The Fifty States, *supra,* at 320. Local problems of law enforcement are quite different from federal problems, and the range of crimes encompassed by the states' jurisdiction creates more complicated patterns to be dealt with. The states are not precluded from developing "workable rules" governing arrest, searches and seizures to meet the practical demands of effective criminal investigation and law enforcement provided these rules do not violate the constitutional proscriptions against unreasonable searches and the concomitant command that evidence so seized is inadmissible against one who has standing to complain. *Ker vs. California,* 374 U. S. 23 (1963); *Beck vs. Ohio,* 379 U. S. 89 (1964). The necessities of law enforcement in large urban areas require the procedures utilized in the instant case. We agree with the District of Columbia Court of Appeals when they stated that they cannot believe that the "Supreme Court has forbidden the police to investigate crime." *Trilling vs. United States,* 260 F. (2d) 677, 700 (D. C. Cir. 1958).

For the reasons stated herein, the judgment of the Common Pleas Court is affirmed.

Exceptions. Order see journal

ARTL, *J.* and CORRIGAN, *J.* concur.

APPENDIX D.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI.

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 18, 1967/

s/ POTTER STEWART,
Associate Justice of the Supreme Court of the United States.

Dated this 12th day of January, 1967.

APPENDIX E.

STATUTE.

§ 2923.01 Carrying of Concealed Weapons.

No person shall carry a pistol, bowie knife, dirk, or other dangerous weapon concealed on or about his person. This section does not affect the right of sheriffs, regularly appointed police officers of municipal corporations, regularly elected constables, and special officers as provided by sections 311.07, 737.10, 1717.06, 1721.14, and 2917.32 of the Revised Code, to go armed when on duty. Deputy sheriffs and specially appointed police officers, except as are appointed or called into service under said sections may go armed of they first give bond to this state, to be approved by the clerk of the court of common pleas, in the sum of one thousand dollars, conditioned to save the public harmless by reason of any unlawful use of such weapons carried by them. Persons injured by such improper use may have recourse on said bond.

Whoever violates this section shall be fined not more than five hundred dollars, or imprisoned in the county jail or workhouse not less than thirty days nor more than six months, or imprisoned in the penitentiary not less than one nor more than three years.